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SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

No. 74-15

# In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

*Respondent,*

vs.

EDWARD E. REICIN,

*Petitioner.*

## Petitioner's Reply

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## PETITIONER'S REPLY

### INTRODUCTION

The Seventh Circuit Court of Appeals described this case as "a scheme to defraud insurance and other companies in personal injury cases by [1] preparing and submitting false and exaggerated medical reports and bills to the companies and [2] by causing claimants 'to absent themselves from employment to increase their alleged damages.'" (A. 2).

With respect to Count 9, the only count on which petitioner was convicted, the prosecutor, in fact, argued only the second charge, that petitioner defrauded the insurance company by causing the claimant, Eauslin, to absent himself from his employment. (A. 29-30).

The trial judge refused to strike the lost time charge from Count 9, and over defense objections instructed the jury that it could convict if either the medical bill charge or the lost time charge were proven.

The government admitted on appeal, the Court of Appeals found, and the Solicitor General admits that there was "no evidence that Eauslin had been induced to take unnecessary time off from work." (Gov't. Br. p. 3).

Nevertheless, petitioner stands convicted upon a general jury verdict which does not specify on which charge the jury based its verdict. Petitioner requests remand for a new trial.

## I.

### The Decision Below Clearly Conflicts With This Court's Ruling in Stromberg v. California and With the Second Circuit's Decision in United States v. Groves.

The Solicitor General accepts the rule of law enunciated by this Court in *Stromberg v. California*, 283 U.S. 359 (1931). This rule, which requires reversal of a general jury verdict which may have been based on unconstitutional, erroneous or unproven, alternative grounds of guilt, has been consistently applied in both criminal and civil cases. See, e.g., *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U.S. 613 (1959); *Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 (1974).

The *Stromberg* rule was applied in *United States* v. *Groves*, 122 F.2d 87 (2d Cir. 1941). *Groves* was a multi-count mail fraud prosecution with each count containing three separate means by which the fraud was practiced. Because the jury was allowed to convict on any of the three means, and because the government failed to prove two of the three means, the conviction was reversed.

*Groves* is indistinguishable from this case. In the case at bar the government charged, attempted to prove and argued to the jury that there were two means by which the fraud was practiced—inflated medical bills or inflated lost time. On Count 9, the government argued only the lost time charge, on which, as the Solicitor General concedes, there was no evidence.

To be sure, the indictment contains surplusage. Petitioner does not argue that each act or representation alleged in the indictment need be proved. However, mere recitation of the litany that "it was not necessary that the government prove each act or representation in the indictment" (Gov't. Br. p. 3) does not meet the issue in this case. When two means of accomplishing the fraud are alleged in the indictment, when the government argues the case in the same manner, and when the jury is instructed that it can convict on *either,* the petitioner is entitled to have a *prima facie* case made on both. To hold otherwise is contrary to *Stromberg, Groves* and the other cases cited by petitioner and permits a verdict in violation of the due process requirement set forth in *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 (1960).

The three cases cited by the Solicitor General are not to the contrary. None of the cases deals with the issue in the case at bar. There is no indication that the indictments in the 3 cases cited charged alternative means of practicing the fraud, that the prosecutors argued alternatively, or that the juries were instructed alternatively.

The cases are further distinguishable on their facts. In *Anderson* v. *United States,* 369 F.2d 11, 15 (8th Cir. 1966), the portion of the decision referred to by the Solicitor General deals with the question of whether criminal intent

was shown, not with the existence of alternative charges. In *Henderson* v. *United States,* 425 F.2d 134 (5th Cir. 1970), the Court reversed the two mail fraud counts on jurisdictional grounds, and stated in dictum that all misrepresentations were proven. Finally, *United States* v. *Hyde,* 448 F.2d 815 (5th Cir. 1971), a Hobbs Act prosecution, is simply inapposite. Surely, the Solicitor General cannot contend that the lost time charge was "surplusage" as was the case before the Fifth Circuit Court of Appeals in *Hyde.* After charging, arguing and instructing that the lost time charge was a proper basis for conviction, the government should not now be allowed to claim that the charge is surplusage.

## II.

### The Trial Court Prejudicially Erred in Refusing to Allow Petitioner to Call Dr. Atlas As An Expert Witness.

Dr. Becker testified that he would not have hospitalized any of the claimants absent petitioner's requests. Although the Court of Appeals recognized that this testimony "undoubtedly helped the Government's case," (A. 15) the Court inconsistently held that any impeachment of that testimony was "collateral". (A. 16). The Solicitor General erroneously argues that the sole purpose of Dr. Atlas' testimony was to show that hospitalization, contrary to Becker's testimony, was necessary.

In fact, Dr. Atlas' testimony would have given petitioner a factual basis to argue the following: (1) that Becker lied or was mistaken when he said petitioner requested hospitalization since Becker admitted that he didn't recall the requests but insisted petitioner made the requests based on the fact that the claimants "really did not need the hospitalization." (R. 272-73); (2) that the medical bills were

not false as charged in the indictment; and (3) that petitioner acted in good faith and without intent to defraud in the event the jury chose to believe Becker when he testified that petitioner requested hospitalization.

It is undisputed that this was a close case. At the close of the government's proof, the trial judge struck portions of the indictment for total failure of proof. The jury acquitted on 10 of 11 counts. And, the Solicitor General agrees that one half of count 9 was unproven. Under all the circumstances, preventing the jury from hearing *all* facts bearing on the question of intent denied petitioner a fair trial.

## CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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